TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 161

LIGGETT AND MYERS TOBACCO CO., PETITIONER,

vs.

THE UNITED STATES

No. 162

THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER,

vs.

THE UNITED STATES

No. 163

LIGGETT AND MYERS TOBACCO CO., ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER,

vs.

THE UNITED STATES

ON WRITS OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CERTIORARI FILED JULY 6, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 161

LIGGETT AND MYERS TOBACCO CO., PETITIONER,

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No. 162

THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER,

vs.

THE UNITED STATES

No. 163

LIGGETT AND MYERS TOBACCO CO., ON BEHALF OF THE COMMONWEALTH OF MASSACHUSETTS, PETITIONER,

vs.

THE UNITED STATES

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

Docket No. 42107

LIGGETT AND MYERS TOBACCO CO., Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant

I. PETITION—Filed November 30, 1932

To the Honorable the Court of Claims:

The Plaintiff respectfully represents:

(1) The plaintiff is a corporation duly incorporated under the laws of New Jersey on or about November 24, 1911, with its principal office and place of business in the city of St. Louis, Missouri.

(2) On or about January 2, 1932, there was in effect the following provision in the Internal Revenue law:

(Sec. 761 of the United States Code. Sec. 3368, Revised Statutes, as Amended)

Tax on Tobacco and Snuff: Snuff Flour

Upon all tobacco and snuff manufactured in or imported into the United States, and sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof. Snuff [fol. 2] flour when sold or removed for use or consumption shall be taxed as snuff and shall be put up in packages and stamped in the same manner as snuff.

(3) Pursuant to the provisions of the Revised Statutes of the United States and subsequent Acts, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, on April 24, 1928, promulgated Regulation 43 which Regulation provides as follows:

Art. 43. Rates of tax on tobacco and snuff.—Date effective—When tax accrues.—The rate of tax on tobacco and

snuff now in force is 18 cents per pound. The rate is the same as under the revenue acts of 1918, 1921, and 1924, but the tax is imposed by the above-quoted provisions of the revenue act of 1926, which became effective upon its enactment. That act was approved February 26, 1926. Such tax is imposed on all chewing and smoking tobacco, fine-cut, Cavendish, plug, or twist, cut or granulated, of every description, on tobacco twisted by hand or reduced into a condition to be consumed, or in any manner other than the ordinary mode of drying and curing, prepared for sale or consumption, even if prepared without the use of any machine or instrument, and without being pressed or sweetened, and on all fine-cut shorts and refuse scraps, clippings, cuttings, and sweepings of tobacco. Tax also accrues on snuff manufactured of tobacco or any substitute for tobacco, ground, dry, damp, pickled, scented, or otherwise, of all descriptions, when prepared for use, and on snuff flour when sold or removed for use or consumption. The tax accrues on such manufacturers upon removal from the factory or place where they were made, or upon sale prior to such removal, and is to be paid by the manufacturer thereof by the affixing of stamps before removal. Refuse scraps, clippings, cuttings, etc., are, how- [fol. 3] ever, not subject to tax when removed from the factory in compliance with article 99 of these regulations.

(4) On or about January 9th, 1932, the plaintiff sold to The Commonwealth of Massachusetts, a sovereign State, and on or about January 19, 1932, there was delivered to the Boston State Hospital, a governmental instrumentality of The Commonwealth of Massachusetts, for free distribution in institutional treatment, four 24 pound boxes of Joe Bowers tobacco, totalling 96 pounds, which made a net charge of $30.62 which sum $30.62 was paid to the plaintiff by the Commonwealth of Massachusetts on or about January 20, 1932.

(5) The purchase of this tobacco was authorized by the Legislature of Massachusetts, and the funds to pay for the cost thereof were levied on the citizens of Massachusetts under the power of taxation.

(6) At various dates through the purchase and accounting for tobacco tax stamps the plaintiff paid to the United States the sum of $17.28 as a tobacco tax at 18 cents a

pound on the 96 pounds purchased by The Commonwealth of Massachusetts, levied, assessed, collected and paid under the provisions of sec. 3368 of the Revised Statutes as amended.

(7) The tax in the sum of $17.28 on the said tobacco shipped for institutional treatment to The Commonwealth of Massachusetts, and received on or about January 19, 1932, was erroneously and illegally levied, assessed, collected and paid, for the reason that it was a direct interference with a governmental instrumentality, which under the decisions of the United States Supreme Court cannot be impeded or endangered by a tax exaction, and that the United States of America cannot enrich itself at the ex-
[fol. 4] pense of The Commonwealth of Massachusetts by a tax which falls directly upon a duly authorized governmental activity of Massachusetts.

(8) On or about January 25, 1932, the plaintiff filed a claim for the refund of the tax paid on the tobacco delivered to Massachusetts on or about January 19, 1932, in the sum of $17.28 with the Collector of Internal Revenue at St. Louis, Missouri. The claim set forth that

The accompanying statements and affidavits establish that the tax here sought to be recovered was paid by the claimant upon tobacco sold and delivered by it to The Commonwealth of Massachusetts, that the purchase of said tobacco by The Commonwealth of Massachusetts was under authority of and with money obtained from the citizens and taxpayers of Massachusetts and that the tobacco was distributed without charge to inmates of a State owned and conducted institution as an instrumentality of State government. The purchase and distribution of tobacco is a well established State function. No tobacco refunds have ever been received. The United States Constitution under interpretation of the United States Supreme Court not permitting the taxing of a State instrumentality, the amount collected by the United States as a tobacco tax from the claimant should be refunded.

In connection with this claim substantially the following was set out as a supplementary statement as to reasons why claim was made:

The statements and affidavits attached to the Claim are executed by duly accredited officials of The Commonwealth

of Massachusetts. The affidavit of Carl A. Raymond, Budget Commissioner, establishes the fact that Massachusetts appropriates money of its citizens and taxpayers [fol. 5] for the purpose of providing tobacco free to the inmates of the Boston State Hospital in order to carry out a long and well-established function of institutional treatment. The affidavit by George M. Kline, Commissioner of Mental Diseases, adds to the fact that the free distribution of tobacco is a well-established practice and that it is a necessary part of institutional treatment at the Boston State Hospital which is a duly established instrumentality of The Commonwealth of Massachusetts. The affidavit by Charles F. Hurley, Treasurer and Receiver-General shows that the money of the taxpayers of Massachusetts through the Treasury of The Commonwealth was employed to pay the tobacco tax upon which claim for refund is here requested. In order for Massachusetts to obtain tobacco for the Boston State Hospital, one of its instrumentalities, it was required to pay in addition to the price of the tobacco a sum representing the tax laid on the claimant as a tobacco tax which the claimant has paid to the Federal government.

Through a long line of decisions the Constitution of the United States has been interpreted by the Supreme Court of the United States as not permitting the federal government to lay a tax on a state. The decisions hold that neither the United States Government nor the States can tax the other for the purpose of enriching itself.

In the case of the Indian Motocycle Co. v. United States, 283 U. S. 570, the Supreme Court held that a tax law which impressed upon the manufacturer a tax that an instrumentality of Massachusetts was obliged to reimburse to the manufacturer in order to obtain a motor cycle contravened the Constitution of the United States. In that case the court held that:—

It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations [fol. 6] whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the inde-

pendence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. Collector v. Day, 11 Wall. 113, 125, 127; Willcuts v. Bunn, 282 U. S. 216, 224-225.

The court in its opinion after citing cases in substantiation of their opinion in this case said in the concluding part of the opinion:—

Under the constitutional principle the exertion of such a function by a State or a state agency has the same immunity from federal taxation that like exertions by the United States or its agencies have from state taxation. Here the tax is laid directly on the sale to a governmental state agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which the United States cannot tax consistently with the constitutional principle.

The fact being here established that the tobaccco purchased by Massachusetts was in the exercise of the furtherance of a state instrumentality and that the Constitution of the United States as interpreted does not permit such an exaction against the state instrumentality, the refund requested should be made in the amount of $17.28.

(9) On or about October 17, 1932, the claim made by the plaintiff on or about January 25, 1932, was disallowed by letter of the Commissioner of Internal Revenue. The reason for disallowance is set forth at considerable length, the essence of which appears in the following quoted paragraphs:

[fol. 7] "Since the tax on tobacco attaches upon its removal from the factory, and the incidence of the tax is a closed transaction before the product is delivered, the inclusion of the tax paid by the manufacturer in the price for which he sells the tobaccco is not a payment of the tax by the purchaser. In is clear that the taxes on the tobacco purchased were not laid directly upon the sale thereof to the Commonwealth of Massachusetts; that the burden of

the tax on the commonwealth was indirect and merely incidental, and the manufacturers are not entitled to have the stamps used in paying the tax redeemed or receive a refund of any portion of the price paid for the product.

The claim for $17.28 is hereby rejected in full."

(10) No part of said sum of $17.28, erroneously collected by the United States of America, has been repaid to the plaintiff. The plaintiff has at all times borne true allegiance to the United States, and has not in any way aided, abetted or given encouragement to rebellion against said government. It is the sole and absolute owner of the claim herein presented. It has made no transfer or assignment of said claim or any part thereof, and is justly entitled to the amount claimed hereunder from the United States after allowing of just credits and setoffs. The plaintiff, however, is free to admit that it would upon the allowance of this claim refund the amount to The Commonwealth of Massachusetts as an amount to which The Commonwealth of Massachusetts would be fairly entitled as it is no part of the purchase price of the tobacco that Massachusetts purchased for free distribution in institutional treatment.

(11) The plaintiff, therefore, prays judgment in the sum of $17.28, with interest thereon at six per cent per annum [fol. 8] from January 20, 1932, the date of the payment of said tax by The Commonwealth of Massachusetts.

Liggett and Myers Tobacco Co., by G. W. Whitaker, Vice President. Henry F. Long, Attorney for for Plaintiff, 239 State House, Boston, Massachusetts.

Duly sworn to by G. W. Whitaker. Jurat omitted in printing.

[fol. 9] II. General Traverse—Filed January 9, 1933

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Charls B. Rugg, Assistant Attorney General.

[fol. 10] IN COURT OF CLAIMS OF THE UNITED STATES

Docket No. 42411

THE COMMONWEALTH OF MASSACHUSETTS, Plaintiff,

v.

THE UNITED STATES OF AMERICA, Defendant

III. PETITION—Filed April 17, 1933

To the Honorable the Court of Claims:

The Plaintiff respectfully represents:

(1) The plaintiff is The Commonwealth of Massachusetts, a sovereign State.

(2) On or about January 2, 1932, there was in effect the following provision in the Internal Revenue law:

(Sec. 761 of the United States Code. Sec. 3368, Revised Statutes, as Amended)

Tax on Tobacco and Snuff: Snuff Flour

Upon all tobacco and snuff manufactured in or imported into the United States, and sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid a tax of 18 cents per pound, [fol. 11] to be paid by the manufacturer or importer thereof. Snuff flour when sold or removed for use or consumption shall be taxed as snuff and shall be put up in packages and stamped in the same manner as snuff.

(3) Pursuant to the provisions of the Revised Statutes of the United States and subsequent Acts, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, on April 24, 1928, promulgated Regulations 8, Article 43 which Article provides as follows:

Art. 43. Rates of tax on tobacco and snuff.—Date effective—When tax accrues.—The rate of tax on tobacco and snuff now in force is 18 cents per pound. The rate is the same as under the revenue acts of 1918, 1921, and 1924, but the tax is imposed by the above-quoted provisions of the

revenue act of 1926, which became effective upon its enactment. That act was approved February 26, 1926. Such tax is imposed on all chewing and smoking tobacco, fine-cut, Cavendish, plug, or twist, cut or granulated, of every description, on tobacco twisted by hand or reduced into a condition to be consumed, or in any manner other than the ordinary mode of drying and curing, prepared for sale or consumption, even if prepared without the use of any machine or instrument, and without being pressed or sweetened, and on all fine-cut shorts and refuse scraps, clippings, cuttings, and sweepings of tobacco. Tax also accrues on snuff manufactured of tobacco or any substitute for tobacco, ground, dry, damp, pickled, scented, or otherwise, of all descriptions, when prepared for use, and on snuff flour when sold or removed for use or consumption. The tax accrues on such manufactures upon removal from the factory or place where they were made, or upon sale prior to such removal, and is to be paid by the manufacturer thereof by the affixing of stamps before removal. Refuse [fol. 12] scraps, clippings, cuttings, etc., are, however, not subject to tax when removed from the factory in compliance with article 99 of these regulations.

(4) The plaintiff purchased from the Liggett and Myers Tobacco Co., the manufacturer, the following described tobacco, on or about January 9, 1932, and on or about January 19, 1932, pursuant to said purchase, there was delivered to the Boston State Hospital, a governmental instrumentality of The Commonwealth of Massachusetts, for free distribution in institutional treatment, four 24 pound boxes of Joe Bowers tobacco, totalling 96 pounds, which made a net charge of $30.62 which sum $30.62 was paid to the Liggett and Myers Tobacco Co. by The Commonwealth of Massachusetts on or about January 20, 1932.

(5) The purchase of this tobacco was authorized by the Legislature of Massachusetts, and the funds to pay for the cost thereof were levied on the citizens of Massachusetts under the power of taxation.

(6) At various dates through the purchase and accounting for tobacco tax stamps the Liggett and Myers Tobacco Co. paid to the United States the sum of $17.28 as a tobacco tax at 18 cents a pound on the 96 pounds purchased by The Commonwealth of Massachusetts, levied, assessed, col-

lected and paid under the provisions of Sec. 3368 of the Revised Statutes as amended. Said sum of $17.28 was included in the $30.62 charged to and collected from the plaintiff as aforesaid.

(7) The tax in the sum of $17.28 on the said tobacco shipped for institutional treatment to The Commonwealth of Massachusetts, and received on or about January 19, 1932, was erroneously and illegally levied, assessed, collected and paid, for the reason that it was a direct interference with a governmental instrumentality, which under [fol. 13] the decisions of the United States Supreme Court cannot be impeded or endangered by a tax exaction, and that the United States of America cannot enrich itself at the expense of The Commonwealth of Massachusetts by a tax which falls directly upon a duly authorized governmental activity of Massachusetts.

(8) A claim for the refund of the tax paid on the tobacco delivered to Massachusetts on or about January 19, 1932, in the sum of $17.28 was filed. The claim set forth that

The purchase of the tobacco by The Commonwealth of Massachusetts was under authority of and with money obtained from the citizens and taxpayers of Massachusetts and that the tobacco was distributed without charge to inmates of a State owned and conducted institution as an instrumentality of State Government. The purchase and distribution of tobacco is a well-established State function. No tobacco refunds have ever been received. The United States Constitution under interpretation of the United States Supreme Court not permitting the taxing of a State instrumentality, the amount collected by the United States as a tobacco tax from the claimant should be refunded.

In connection with this claim substantially the following was advanced as a supplementary statement as to reasons why claim was made:

The statements and affidavits supporting the Claim are executed by duly accredited officials of The Commonwealth of Massachusetts. The affidavit of Carl A. Raymond, Budget Commissioner, establishes the fact that Massachusetts appropriates money of its citizens and taxpayers for the purpose of providing tobacco free to the inmates of the

Boston State Hospital in order to carry out a long and well-[fol. 14] established function of institutional treatment. The affidavit by George M. Kline, Commissioner of Mental Diseases, adds to the fact that the free distribution of tobacco is a well-established practice and that it is a necessary part of institutional treatment at the Boston State Hospital which is a duly established instrumentality of The Commonwealth of Massachusetts. The affidavit by Charles F. Hurley, Treasurer and Receiver-General, shows that the money of the taxpayers of Massachusetts through the Treasury of The Commonwealth was employed to pay the tobacco tax upon which claim for refund is here requested. In order for Massachusetts to obtain tobacco for the Boston State Hospital, one of its instrumentalities, it was required to pay in addition to the price of the tobacco a sum representing the tax paid on the claimant as a tobacco tax which the claimant has paid to the Federal government.

Through a long line of decisions the Constitution of the United States has been interpreted by the Supreme Court of the United States as not permitting the federal government to lay a tax on a state. The decisions hold that neither the United States Government nor the states can tax the other for the purpose of enriching itself.

In the case of the Indian Motocycle Co. v. United States, 283 U. S. 570, the Supreme Court held that a tax law which impressed upon the manufacturer a tax that an instrumentality of Massachusetts was obliged to reimburse to the manufacturer in order to obtain a motor cycle contravened the Constitution of the United States. In that case the court held that:

It is an established principle of our constitutional system of dual government that the instrumentalities, means and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States, exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence [fol. 15] of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. Col-

lector v. Day, 11 Wall. 113, 125, 127; Willcuts v. Bunn, 282 U. S. 216, 224-225.

The court in its opinion after citing cases in substantiation of their opinion in this case said in the concluding part of the opinion:

Under the constitutional principle the exertion of such a function by a State or a state agency has the same immunity from federal taxation that like exertions by the United States or its agencies have from state taxation. Here the tax is laid directly on the sale to a governmental state agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which the United States cannot tax consistently with the constitutional principle.

The fact being here established that the tobacco purchased by Massachusetts was in the exercise of the furtherance of a state instrumentality and that the Constitution of the United States as interpreted does not permit such an exaction against the state instrumentality, the refund requested should be made in the amount of $17.28.

(9) On or about March 31, 1933, the claim made by the plaintiff was disallowed by letter of the Commissioner of Internal Revenue. The reason for disallowing is set forth at considerable length, the essence of which appears in the following quoted paragraphs:—

[fol. 16] "Since the tax on tobacco attaches upon its removal from the factory, and the incidence of the tax is a closed transaction before the product is delivered, the inclusion of the tax paid by the manufacturer in the price for which he sells the tobacco is not a payment of the tax by the purchaser. It is clear that the taxes on the tobacco purchased were not laid directly upon the sale thereof to the Commonwealth of Massachusetts; that the burden of the tax on the commonwealth was indirect and merely incidental, and it is not entitled to have the stamps used in paying the tax redeemed or receive a refund of any portion of the price paid for the product.

The claim for $17.28 is hereby rejected in full."

(10) No part of said sum of $17.28, erroneously collected by the United States of America, has been repaid to the Liggett and Myers Tobacco Co., or to The Commonwealth of Massachusetts.

(11) The plaintiff, therefore, prays judgment in the sum of $17.28, with interest thereon at six per cent per annum from January 30, 1932, the date of the payment of said tax by The Commonwealth of Massachusetts.

The Commonwealth of Massachusetts, (Signed) by Charles F. Hurley, Treasurer and Receiver-General. Joseph E. Warner, Attorney General, by Charles F. Lovejoy, Assistant Attorney General, Attorney for Plaintiff, 373 State House, Boston. Henry F. Long, 239 State House, Boston, Of Counsel.

[fol. 17] *Duly sworn to by Charles F. Hurley. Jurat omitted in printing.*

[fol. 18] IV. General Traverse—Filed May 26, 1933

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

W. W. Scott, Acting Head, Court of Claims Division.

[fol. 19] In Court of Claims of the United States

Docket No. 42412

Liggett and Myers Tobacco Co., on Behalf of The Commonwealth of Massachusetts, Plaintiff,

v.

The United States of America, Defendant

V. Petition—Filed April 17, 1933

To the Honorable the Court of Claims:

The Plaintiff respectfully represents:

(1) This proceeding is brought by the Liggett and Myers Tobacco Co., a corporation duly incorporated under the

laws of New Jersey on or about November 24, 1911, with its principal office and place of business in the city of St. Louis, Missouri, for and on behalf of The Commonwealth of Massachusetts, a sovereign State.

(2) On or about January 2, 1932, there was in effect the following provision in the Internal Revenue law:

[fol. 20] (Sec. 761 of the United States Code. Sec. 3368, Revised Statutes, as Amended)

Tax on Tobacco and Snuff: Snuff Flour

Upon all tobacco and snuff manufactured in or imported into the United States, and sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof. Snuff flour when sold or removed for use or consumption shall be taxed as snuff and shall be put up in packages and stamped in the same manner as snuff.

(3) Pursuant to the provisions of the Revised Statutes of the United States and subsequent Acts, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, on April 24, 1928, promulgated Regulations 8, Article 43 which Article provides as follows:

Art. 43. Rates of tax on tobacco and snuff.—Date Effective—When tax accrues.—The rate of tax on tobacco and snuff now in force is 18 cents per pound. The rate is the same as under the revenue acts of 1918, 1921, and 1924, but the tax is imposed by the above-quoted provisions of the revenue act of 1926, which became effective upon its enactment. That act was approved February 26, 1926. Such tax is imposed on all chewing and smoking tobacco, fine-cut Cavendish, plug, or twist, cut or granulated, of every description, on tobacco twisted by hand or reduced into a condition to be consumed, or in any manner other than the ordinary mode of drying and curing, prepared for sale or consumption, even if prepared without the use of any machine or instrument, and without being pressed or sweetened, and on all fine-cut shorts and refuse scraps, [fol. 21] clippings, cuttings, and sweepings of tobacco. Tax also accrues on snuff manufactured of tobacco or any sub-

stitute for tobacco, ground, dry, damp, pickled, scented, or otherwise, of all descriptions, when prepared for use, and on snuff flour when sold or removed for use or consumption. The tax accrues on such manufactures upon removal from the factory or place where they were made, or upon sale prior to such removal, and is to be paid by the manufacturer thereof by the affixing of stamps before removal. Refuse scraps, clippings, cuttings, etc., are, however, not subject to tax when removed from the factory in compliance with article 99 of these regulations.

(4) The Commonwealth of Massachusetts purchased from the Liggett and Myers Tobacco Co., the manufacturer, on or about January 9, 1932, the following described tobacco, and on or about January 19, 1932, there was delivered to the Boston State Hospital, a governmental instrumentality of The Commonwealth of Massachusetts, for free distribution in institutional treatment, four 24 pound boxes of Joe Bowers tobacco, totalling 96 pounds, which made a net charge of $30.62 which sum $30.62 was paid to the Liggett and Myers Tobacco Co. by The Commonwealth of Massachusetts on or about January 20, 1932.

(5) The purchase of this tobacco was authorized by the Legislature of Massachusetts, and the funds to pay for the cost thereof were levied on the citizens of Massachusetts under the power of taxation.

(6) At various dates through the purchase and accounting for tobacco tax stamps the Liggett and Myers Tobacco Co. paid to the United States the sum of $17.28 as a tobacco tax at 18 cents a pound on the 96 pounds purchased by The Commonwealth of Massachusetts, levied, assessed, collected, and paid under the provisions of sec. 3368 of the Revised Statutes as amended. Said sum of $17.28 was [fol. 22] included in the $30.62 charged to and collected from The Commonwealth of Massachusetts as aforesaid.

(7) The tax in the sum of $17.28 on the said tobacco shipped for institutional treatment to The Commonwealth of Massachusetts, and received on or about January 19, 1932, was erroneously and illegally levied, assessed, collected and paid, for the reason that it was a direct interference with a governmental instrumentality, which under

the decisions of the United States Supreme Court cannot be impeded or endangered by a tax exaction, and that the United States of America cannot enrich itself at the expense of The Commonwealth of Massachusetts by a tax which falls directly upon a duly authorized governmental activity of Massachusetts.

(8) A claim for the refund of the tax paid on the tobacco delivered to Massachusetts on or about January 19, 1932, in the sum of $17.28 was filed. The claim set forth that:

The purchase of the tobacco by The Commonwealth of Massachusetts was under authority of and with money obtained from the citizens and taxpayers of Massachusetts and that the tobacco was distributed without charge to inmates of a state owned and conducted institution as an instrumentality of state government. The purchase and distribution of tobacco is a well established state function. No tobacco refunds have ever been received. The United States Constitution under interpretation of the United States Supreme Court not permitting the taxing of a State instrumentality, the amount collected by the United States as a tobacco tax from the claimant should be refunded.

In connection with this claim substantially the following was advanced as a supplementary statement as to reasons why claim was made:

[fol. 23] The statements and affidavits supporting the Claim are executed by duly accredited officials of The Commonwealth of Massachusetts. The affidavit of Carl A. Raymond, Budget Commissioner, establishes the fact that Massachusetts appropriates money of its citizens and taxpayers for the purpose of providing tobacco free to the inmates of the Boston State Hospital in order to carry out a long and well-established function of institutional treatment. The affidavit by George M. Kline, Commissioner of Mental Diseases, adds to the fact that the free distribution of tobacco is a well-established practice and that it is a necessary part of institutional treatment at the Boston State Hospital which is a duly established instrumentality of The Commonwealth of Massachusetts. The affidavit by Charles F. Hurley, Treasurer and Receiver-General shows that the money of the taxpayers of Massachusetts through

the Treasury of The Commonwealth was employed to pay the tobacco tax upon which claim for refund is here requested. In order for Massachusetts to obtain tobacco for the Boston State Hospital, one of its instrumentalities, it was required to pay in addition to the price of the tobacco a sum representing the tax laid on the claimant as a tobacco tax which the claimant has paid to the Federal government.

Through a long line of decisions the Constitution of the United States has been interpreted by the Supreme Court of the United States as not permitting the federal government to lay a tax on a state. The decisions hold that neither the United States Government nor the states can tax the other for the purpose of enriching itself.

In the case of the Indian Motocycle Co. v. United States, 283 U. S. 570, the Supreme Court held that a tax law which impressed upon the manufacturer a tax that an instrumentality of Massachusetts was obliged to reimburse to the manufacturer in order to obtain a motor cycle contravened the Constitution of the United States. In that case the court held that:

It is an established principle of our constitutional system of dual government that the instrumentalities, means [fol. 24] and operations whereby the United States exercises its governmental powers are exempt from taxation by the States, and that the instrumentalities, means and operations whereby the States exert the governmental powers belonging to them are equally exempt from taxation by the United States. This principle is implied from the independence of the national and state governments within their respective spheres and from the provisions of the Constitution which look to the maintenance of the dual system. Collector v. Day, 11 Wall. 113, 125, 127; Willcuts v. Bunn, 282 U. S. 216, 224-225.

The court in its opinion after citing cases in substantiation of their opinion in this case said in the concluding part of the opinion:

Under the constitutional principle the exertion of such a function by a State or a state agency has the same immunity from federal taxation that like exertions by the United

States or its agencies have from state taxation. Here the tax is laid directly on the sale to a governmental state agency of an article purchased for governmental purposes. The sale and purchase constitute a single transaction, in which the purchaser is an essential participant. Without that participation the sale could not be effected. Thus, the transaction falls within the class which the United States cannot tax consistently with the constitutional principle.

The fact being here established that the tobacco purchased by Massachusetts was in the exercise of the furtherance of a state instrumentality and that the Constitution of the United States as interpreted does not permit such an exaction against the state instrumentality, the refund requested should be made in the amount of $17.28.

(9) On or about April 10, 1933, the claim made by the plaintiff was disallowed by letter of the Acting Commis- [fol. 25] sioner of Internal Revenue. The reason for disallowance is set forth at considerable length, the essence of which appears in the following quoted paragraphs:

"Since the tax on tobacco attaches upon its removal from the factory, and the incidence of the tax is a closed transaction before the product is delivered, the inclusion of the tax paid by the manufacturer in the price for which he sells the tobacco is not a payment of the tax by the purchaser. It is clear that the taxes on the tobacco purchased were not laid directly upon the sale thereof to the Commonwealth of Massachusetts; that the burden of the tax on the commonwealth was indirect and merely incidental, and the manufacturers are not entitled to have the stamps used in paying the tax redeemed or receive a refund of any portion of the price paid for the product either for themselves or for benefit of the purchaser.

The claim for $17.28 is hereby rejected in full."

(10) No part of said sum of $17.28, erroneously collected by the United States of America, has been repaid to the Liggett and Myers Tobacco Co., or to The Commonwealth of Massachusetts.

(11) The plaintiff, therefore, prays judgment in the sum of $17.28, with interest thereon at six per cent per annum

from January 20, 1932, the date of the payment of said tax by The Commonwealth of Massachusetts.

Liggett and Myers Tobacco Co. on behalf of The Commonwealth of Massachusetts, by Henry F. Long, Its Attorney.

Henry F. Long, Attorney for Plaintiff, 239 State House, Boston, Massachusetts.

[fol. 26] *Duly sworn to by Henry F. Long. Jurat omitted in printing.*

[fol. 27] VI. General Traverse—Filed May 26, 1933

And now comes the Attorney General, on behalf of the United Stafes, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

W. W. Scott, Acting Head, Court of Claims Division.

[fol. 28] VII. Argument and Submission of Cases

On December 4, 1935, the three above mentioned cases were argued and submitted together on merits by Mr. Henry F. Long, for the plaintiffs, and by Mr. Fred K. Dyar, for the defendant.

VIII. History of Proceedings

On January 6, 1936, the court filed findings of fact, conclusions of law, and entered judgment dismissing the petitions in the three cases, with an opinion by Green, J.

On February 24, 1936, the plaintiffs filed a motion for new trial and for amendment of findings in the three cases.

On April 6, 1936, the court entered the following order on said motion:

[fol. 29] IX. Order Amending Findings—April 6, 1936

Now on this sixth day of April, 1936, upon consideration of the motion to amend the findings and for new trial in the three cases above mentioned, it is ordered by the Court

that the findings be amended by adding thereto the following:

The Boston State Hospital is maintained by the Commonwealth of Massachusetts for care and treatment of those having mental diseases. Institutional treatment of the insane has existed for several centuries although the early treatments were largely limited to the confinement of the violently insane. State treatment of the mentally diseased at public expense has existed in the United States and in the Commonwealth of Massachusetts for many years, but a few States provide practically no such facilities. The Boston State Hospital is useful in the maintenance of public welfare and order in the Commonwealth of Massachusetts. The power of restraining patients is conferred upon the hospital by the State. While there are private hospitals for the care of the insane located and operated in the State, they are conducted for profit and the average patient does not have the means to pay their charges. In the Boston State Hospital, patients pay if they are able, but if not pay nothing. The hospital performs a useful service.

It is further ordered that the above-entitled cases be set down for oral argument at the May term of this court, such argument to be confined to matters arising from or connected with the amendments made to the findings.

A ruling on the remainder of the motion is reserved until after oral argument has been made in accordance with this order.

[fol. 30] X. **Special Findings of Fact, as Amended by the Order of April 6, 1936, Conclusion of Law in the Three Cases, and Opinion of the Court by Green, J.**

No. 42107

LIGGETT AND MYERS TOBACCO CO.

v.

THE UNITED STATES

No. 42411

THE COMMONWEALTH OF MASSACHUSETTS

v.

THE UNITED STATES

No. 42412

LIGGETT AND MYERS TOBACCO CO., On Behalf of the COMMONWEALTH OF MASSACHUSETTS,

v.

THE UNITED STATES

Mr. Henry F. Long for plaintiffs.

Mr. Fred K. Dyar, with whom was Mr. Assistant Attorney General Frank J. Wideman, for defendant.

Mr. John J. Bennett, Jr., attorney general, as amicus curiæ for the State of New York. Mr. Wendell P. Brown was on the brief.

Mr. A. A. F. Seawell, attorney general, Mr. Charles Ross, and Mr. Edward A. Adams, as amici curiæ for the States of North Carolina, South Carolina, and California.

Mr. Paul A. Dever, attorney general, for the Commonwealth of Massachusetts. Mr. Charles F. Lovejoy was on the briefs.

These cases having been heard by the Court of Claims, the court, upon the evidence adduced, makes the following

SPECIAL FINDINGS OF FACT

The Liggett and Myers Tobacco Company is a corporation engaged in the business of dealing in and manufactur-

ing tobacco and pursuant to the law maintains a bonded warehouse for storing manufactured tobacco. The estab- [fol. 31] lished internal-revenue procedure was to affix the stamps required by law to be placed upon the manufactured tobacco before the tobacco was removed from the factory. About January 6, 1932, the plaintiff (Liggett and Myers) received an order from the Commonwealth of Massachusetts, through its purchasing agent, for four boxes of manufactured tobacco totaling ninety-six pounds net weight to be delivered to the Boston State Hospital, owned and operated by the Commonwealth of Massachusetts in that State. The plaintiff had in its bonded warehouse the tobacco so ordered in packages to which had been affixed the internal revenue stamps required by law duly canceled. The aggregate amount of the stamps so canceled was $17.28 and pursuant to the order received the tobacco was delivered about January 19, 1932, to the Boston State Hospital. On the day of shipment the plaintiff sent a bill to the Boston State Hospital in the sum of $30.62, being the price of the tobacco including the tax paid by internal revenue stamps. This bill was paid by the Commonwealth of Massachusetts.

The tobacco so shipped and received by the hospital was distributed free to patients thereof under the authority from the law of Massachusetts and in the course of institutional treatment of the patients.

The Boston State Hospital is maintained by the Commonwealth of Massachusetts for care and treatment of those having mental diseases. Institutional treatment of the insane has existed for several centuries although the early treatments were largely limited to the confinement of the violently insane. State treatment of the mentally diseased at public expense has existed in the United States and in the Commonwealth of Massachusetts for many years, but a few States provide practically no such facilities. The Boston State Hospital is useful in the maintenance of public welfare and order in the Commonwealth of Massachusetts. The power of restraining patients is conferred upon the hospital by the State. While there are private hospitals for the care of the insane located and operated in the State, they are conducted for profit and the average patient does not have the means to pay their charges. In the Boston State Hospital, patients pay if they are able,

but if not pay nothing. The hospital performs a useful service.

No. 42107

About January 25, 1932, the plaintiff filed with the collector of internal revenue at St. Louis, Missouri, a claim for the sum of $17.28, the amount of the stamps used in payment of the tax on the tobacco shipped to the hospital, alleging as the basis for the claim that the tax so sought to be recovered was paid by the plaintiff on tobacco sold and delivered by it to the Commonwealth of Massachusetts, which was by said State, in pursuance of the laws thereof, distributed without charge to inmates of a State owned and operated institution as an instrumentality of government. The claim for refund was disallowed.

Nos. 42411 and 42412

In each of these cases the plaintiff therein filed a claim for refund in due time and in proper form upon substantially the same grounds as were stated in the claim for refund filed in No. 42107.

Conclusion of Law in No. 42107

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is therefore ordered that its petition be dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Conclusion of Law in No. 42411

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is therefor ordered that its petition be dismissed.

[fol. 32] Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

CONCLUSION OF LAW IN NO. 42412

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover, and it is therefore ordered that its petition be dismissed.

Judgment is rendered against the plaintiff in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

OPINION

GREEN, Judge, delivered the opinion of the court:

The three cases above entitled are by agreement submitted together. The facts upon which the issue arises and the issue itself are the same in each case, but only one of the parties plaintiff can in any event recover judgment.

The Commonwealth of Massachusetts, a State, owns and operates a public hospital known as the Boston State Hospital. In the course of the treatment of patients in this hospital manufactured tobacco is distributed free of charge. The question involved in the case is whether the Federal tax on such tobacco is valid as against the State.

The Revenue Act of 1926 in section 401 (a) provides:

"Upon all tobacco and snuff manufactured in or imported into the United States, and hereafter sold by the manufacturer or importer, or removed for consumption or sale, there shall be levied, collected, and paid * * * a tax of 18 cents per pound, to be paid by the manufacturer or importer thereof."

The plaintiffs contend that under this statute the tax is upon the sale of the tobacco while the defendant, on the contrary, insists that it is upon both the removal and the sale. Both sides argue the question thus presented at length in their respective briefs, but we do not think it is necessary to pass upon it. The basis for plaintiffs' argument on this point is found in the opinions rendered in the cases of Panhandle Oil Co. v. Knox, 277 U. S. 218, and Indian Motocycle Co. v. United States, 283 U. S. 570. Both of these cases involve the question of how far the National

Government may go in taxing the agencies or instrumentalities of a State, but there was an important difference between the facts in those cases and the facts of the cases at bar. In both of the cited cases it was clear that the article in connection with which the tax was levied was used in the performance of an essential governmental function. In the Panhandle Oil case, the gasoline sold was used in operating the coast guard fleet and a veterans' hospital; and in the Indian Motocycle case, the article sold was used by and necessary to the State police force. It is well settled that neither a State nor the Nation can impose a tax which directly burdens the other in the exercise of its sovereign powers. Hence the decision in these cases turned [fol. 33] on the nature of the tax rather than upon the nature of the governmental operations with which it was claimed the tax interfered and upon which it cast a burden. In the cases now before us it is necessary to determine whether the operations of the State which are alleged to have been burdened by the tax were the exercise of an essential governmental function making use of governmental powers.

The manufactured tobacco in connection with which the tax was laid was sold to the State and the State made use of it in its hospital in the treatment of the patients there. Plaintiffs have presented evidence to show that the tobacco was properly used in the hospital treatment of its patients. We think this was unnecessary and that it would be presumed in the absence of evidence to the contrary that the tobacco was properly used, that the hospital was a benefit to the people of the State, and that the State had power to engage in its operation. For the purpose of the argument on the point now beng discussed, it may be assumed that the tax cast a burden upon the operation of the hospital. But it does not necessarily follow from these matters that the State can purchase tobacco free of tax.

In South Carolina v. United States, 199 U. S. 437, 461, the prevailing rule was indicated to be:

"* * * the exemption of State agencies and instrumentalities from national taxation is limited to those which are of a strictly *governmental* character, and does not extend to those which are used by the State in the carrying on of an ordinary private business." (Italics ours.)

By "strictly governmental character" reference is made, as we think, to those operations which embody some kind of control over persons or things which can be exercised only by a sovereign power. In other words, as stated in Metcalf & Eddy v. Mitchell, 269 U. S. 514, 522, while the line cannot be drawn in terms of universal application, the Supreme Court "has repeatedly held that those agencies through which either [State or Federal] government *immediately and directly exercises its sovereign powers,* are immune from the taxing power of the other." (Italics ours.) It follows conversely, that where the government engages in some business in which its sovereign powers are not exercised, its operations are not immune from taxation.

We think it obvious that in establishing and maintaining a hospital the State of Massachusetts is not exercising any sovereign power. Individuals or corporations can and do establish hospitals and it is a matter of common knowledge that they have done this in the State of Massachusetts. The hospital which is conducted by the State may be more beneficial to its citizens than those which are established by private individuals, but it accomplishes nothing which they could not do if they saw fit, and the powers which are exercised by the State in carrying on the hospital are simply those which belong to every individual who is possessed with the financial means to put them into execution.

The benefits conferred by the action of the State upon its citizens do not determine whether the State is exempt from the burdens of taxation by the Federal Government. To supply a community with pure water, or artificial light, to relieve the congestion of city streets by transportation, are enterprises that are beneficial to the public, often better [fol. 34] performed by the local government than by private concerns, and in some cases not likely to be undertaken by private citizens or corporations. Yet it has been held by the Supreme Court that these matters are not essential governmental functions. The ultimate question in the cases before us must be determined according to the nature of the power exercised, and if the power be one which does not belong exclusively to the State but is shared in common by individuals generally, the exercise of it does not bring immunity from taxation by the Federal Government. In the case of Flint v. Stone Tracy Co., 220 U. S. 107, 172, in which the same question arose, the Supreme Court said:

"The true distinction is between the attempted taxation of those operations of the States essential to the execution of its governmental functions, *and which the State can only do itself*, and those activities which are of a private character." (Italics ours.)

And having made this distinction, it held that the United States could not interfere by taxing the agencies of the State in carrying out the purposes of the first class but that the others were not removed from the field of legitimate taxation.

The operation of the hospital not being essential to the execution of the governmental functions of the State and not one which the State only could carry on, it follows that no immunity from taxation has been established and that the petition in each of the three cases must be dismissed. It is so ordered.

Whaley, Judge; Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

[fol. 35] XI. JUDGMENT IN No. 42107

At a Court of Claims held in the City of Washington on the 6th day of April, A. D. 1936, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is therefore ordered and adjudged that the petition of the plaintiff, Liggett and Myers Tobacco Company, be and the same is hereby dismissed.

XII. JUDGMENT IN No. 42411

At a Court of Claims held in the City of Washington on the 6th day of April, A. D., 1936, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is therefore ordered and adjudged that the petition of the plaintiff, The Commonwealth of Massachusetts, be and the same is hereby dismissed.

XIII. JUDGMENT IN No. 42412

At a Court of Claims held in the City of Washington on the 6th day of April, A. D., 1936, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiff is not entitled to recover.

It is therefore ordered and adjudged that the the petition of the plaintiff, Liggett and Myers Tobacco Co., on behalf of The Commonwealth of Massachusetts, be and the same is hereby dismissed.

[fol. 36] XIV. ARGUMENT AND SUBMISSION OF PLAINTIFFS' MOTIONS FOR NEW TRIAL

On May 4, 1936, the plaintiffs' motions for new trial, in the three cases, were argued and submitted by Mr. Henry F. Long, for plaintiffs, and by Mr. Fred K. Dyar, for defendant.

XV. ORDER OVERRULING PLAINTIFFS' MOTIONS FOR NEW TRIAL

It is ordered this 9th day of June, 1936, that the plaintiffs' motions for new trial, in the three above-mentioned cases, be and the same are hereby overruled.

[fol. 37] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: Enter Henry F. Long. File Nos. 40,701, 40,702, 40,703. Court of Claims. Term No. 161. Liggett and Myers Tobacco Co., Petitioner, vs. The United States. Term No. 162. The Commonwealth of Massachusetts, Petitioner, vs. The United States. Term No. 163. Liggett and Myers Tobacco Co., on behalf of The Commonwealth of Massachusetts, Petitioner, vs. The United States. Petition for writs of certiorari and exhibit thereto. Filed July 6, 1936. Term Nos. 161, O. T., 1936, 162, O. T., 1936, 163 O. T., 1936.

[fol. 38] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 161

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 39] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 162

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 40] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1936

No. 163

ORDER ALLOWING CERTIORARI—Filed October 12, 1936

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.